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Nos. 05-908 and 05-915

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Respondents.

CRYSTAL D. MEREDITH, CUSTODIAL PARENT AND NEXT FRIEND OF JOSHUA RYAN McDONALD,
Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH AND NINTH CIRCUITS

BRIEF OF VARIOUS SCHOOL CHILDREN FROM LYNN, MASSACHUSETTS, WHO ARE PARTIES IN COMFORT v. LYNN SCHOOL COMMITTEE, FILED IN SUPPORT OF THE PETITIONERS

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STATEMENT OF CONSENT

This brief is filed with the consent of all parties, who have lodged their universal letters of consent with the Clerk of this Court.

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The *amici* consist of school children from the City of Lynn, Massachusetts who were the Plaintiffs/Petitioners in *Comfort, et al. v. Lynn School Committee, et al.*, 418 F.3d 1 (1st Cir. 2005), USSC No. 05-418 (Petition for Writ of Certiorari denied December 5, 2005, motion for leave to file out-of-time petition for rehearing denied, July 31, 2006). The plaintiffs in the *Comfort* case are a multi-ethnic group of parents of school age children who have been denied – on the basis of their race – full participation in the benefits of a school choice program adopted by the Lynn Public Schools.

Through this brief, the *amici* will address the impact on third parties caused by the continued use of assignment plans like the ones sanctioned by the Sixth and Ninth Circuits in the cases at bar.

The school children of Lynn are currently subject to race-based restrictions on school assignments. The *amici* have been subject to the racial stigmatization caused by race-based denials of school assignments. Their families have confronted the practical harms that are caused when a child is denied a desired school assignment for having the wrong skin color.

The continued use of the racial barrier to which the *amici* are subjected will be controlled by this Court's decision in these cases. The Seattle assignment plan is similar to that used by the Lynn Public Schools. The decision of the *en banc* panel of the Ninth Circuit at issue in *Parents Involved in Community Schools* 426 F.3d 1162 (9th Cir. 2006) (*PICS*) closely mirrors the decision of the

en banc panel of the First Circuit in the *Comfort* case, which sustained the Lynn Plan four months prior to the Ninth Circuit's decision in *PICS*.

While the Jefferson County assignment plan at issue in *Meredith* does not use the same model as the Lynn and Seattle plans, the case raises identical constitutional questions concerning the appropriateness of racial balancing as an objective of public education and concerning the use of mechanically applied racial quotas to achieve that goal. The *Comfort* Plaintiffs participated as *amici* in the *Meredith* matter before the Court of Appeals for the Sixth Circuit.

It is the hope of the *amici* Lynn school children that this Court, through these cases, will end the use of non-remedial racial balancing plans in public schools.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has addressed the use of voluntarily-adopted race-based student assignment plans that create *de jure* segregated schools, *see e.g., Brown* v. *Brd. of Education*, 347 U.S. 483, 493 (1952), but the question of whether *de jure* discriminatory assignment plans can be utilized to address *de facto* "segregation" within public school systems has not been answered by this Court.[1]

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[1] The use of the description "segregated" to describe either the housing patterns or racial makeup of the schools in Seattle and Jefferson County is not truly appropriate because the uneven racial composition of these neighborhoods and schools does not result from any law or action of the local governmental defendants – requirement for meeting the definition of segregated. A neighborhood or school cannot be "segregated" unless government caused a separation the races in those neighborhoods or schools. The findings in both cases are that no such *de jure* action to separate the races caused these patterns. The term *de fact* segregation was used by the lower courts and is used here simply as a means of addressing those findings.

In endorsing *de jure* discrimination to address naturally occurring housing patterns ("*de facto* segregation"), which result in limited *de facto* "segregation" within public schools, the Sixth and Ninth Circuits approved of the very practices rejected by this Court in *Gratz* and *Grutter* – the use of inflexible, mechanically-applied quotas to achieve racial balancing. *Grutter* v. *Bollinger*, 539 U.S. 306, 316 (2003) ("The [law school] policy does not define diversity 'solely in terms of racial and ethnic status'"); *Gratz* v. *Bollinger*, 539 U.S. 244, 270 (2003) (a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity").

The experience of Seattle after the suspension of its Plan, as well as the similar experiences of other cities, proves that race-based plans are ineffective providing the educational or social developmental goals attributed to them. School systems that have ended the use of racial barrier to school assignments have suffered no ill effects, other than a reduction in racial proportionality within the school system, as a result of the suspension or termination of race-based plans.

While these race-based plans have proven ineffective, their harm to individual children and families is very real. Children are being denied access to educational programs and the ability of parents to participate in their child's schools have been diminished. Further, children turned away from schools because they were born with the wrong skin color are being taught a destructive life lesson about the race. These children are being taught that their race supercedes all other individual characteristics and skills they posses. Children are also being taught – through example – that it is appropriate to judge individuals based on their race. The erroneous lesson is also being taught that minority children cannot be adequately educated unless they are split up and surrounded by a sufficient number of white children.

ARGUMENT

I. Racial balancing is inherently inconsistent with the Equal Protection Clause

The decisions of the Sixth and Ninth Circuits typify efforts by some to stretch this Court's decision in *Grutter* to permit the use of racial classifications in order to maintain racial balancing. The efforts squarely conflict with this Court's precedent. In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, this Court held:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

402 U.S. 1, 24 (1971). Racial balancing is inappropriate because "the first remedial responsibility of school authorities is to eliminate invidious racial distinctions." *Id.* at 18. Racial balancing perpetuates racial distinctions, rather than eliminating them because children are taught that race dictates how they will be treated, rather than their individual needs or characteristics.

After holding that perpetual racial balancing would exceed even the remedial power of courts, this Court explained: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23. Regardless of how "pupil of a racial minority" is defined (children classified as "white" make up only 40% of Seattle's student population), children in Jefferson County and Seattle are excluded from certain public schools because of their race.

The impact of expanding *Grutter* so as to eliminate the general prohibition against assigning children by skin color cannot be overstated. Racial balancing, as a

compelling interest, would not be limited to school systems that have identified some particular constitutional failing that needs to be remedied through the temporary use of a racial classification. This interest is so expansive as to permit the virtually limitless use of race-based assignments in public schools. If maintaining racial diversity justifies the inflexible mechanical use of race-based assignment processes, as held in the present cases, then it is hard to conceive of any public school system across the country that would not be free to make school assignment based on skin color.

Racial diversity is not the same as viewpoint diversity. The "true educational diversity" or "viewpoint diversity" endorsed by this Court in *Grutter* is based on improving academic discourse among college students by ensuring a diversity of views, and was not based on racial balancing. *Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional").

The justification for racial diversity interest adopted by the First, Sixth and Ninth Circuits cannot be found in *Grutter*. The interest in multifaceted viewpoint diversity accepted as compelling in *Grutter* is rooted in the First rather than the Fourteenth Amendment. *Grutter*, 539 U.S. at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"), *citing*, *Regents of University of California* v. *Bakke*, 438 U.S. 265, 312 (1978).

Measuring diversity by race does not advance the First Amendment interest in the "expansive freedoms of speech and thought" within academia. Attempting to utilize school assignments based soley on race as a tool to advance "the robust exchange of ideas" assumes, in the

case of Jacksonville County, that all blacks think alike, or in the case of Seattle, it assumes that all "minorities" think alike or will all contribute to a classroom in the same way. *Contra*, *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993) ("the perception that members of the same racial group - regardless of their age, education, economic status, or the community in which they live - think alike, share the same political interests, and will prefer the same candidates at the polls [amounts to impermissible racial stereotypes]"), *citing*, *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury") and *Holland* v. *Illinois*, 493 U.S. 474, 484, n.2 (1990). The *Shaw* Court went on to note that policies, which perpetuate such stereotypes, run the risk of exasperating the racial divisions within our society. *Shaw*, 509 U.S. at 648-49.

II. Race-based student assignment plans cause harm to children and to their families

A. The denial of a school assignment based on a child's race inflicts real harm on the child and on the child's family

School systems like the ones at issue in the *Meredith*, *PICS* and *Comfort* cases, must offer attractive choices to entice parents to make certain assignment choices. At the same time, these plans also deny access to these enticements in order to control racial composition of the schools. The resulting assignments are in many cases very burdensome to the families. Because these racial balancing plans are implemented in urban areas, the families affected are typically in the lowest income levels with the least ability to overcome the obstacles.

The factors that motivate choices in schools can be varied. Among the parents of Lynn students involved in

the *Comfort* case, issues such as availability of special programs, partnerships between schools and community groups, proximity to work, availability of after school programs or proximity to child care all played a role in choice of schools. Other factors that make a particular school valuable to a parent or child can include the presence of a family members in the school,[2] or the proximity of the school to the parent's workplace.

One of the *Comfort* parents sought a school assignment so that her daughter could attend the after school program Girls, Inc.,[3] which was located next to one of Lynn's public schools. But because her daughter was born with the wrong skin color for the desired school, she was initially denied the ability to participate in the Girls, Inc. program.[4] Another parent wished her child to attend a school at which a relative was employed.

Several parents wanted their children to attend schools located in safer neighborhoods. One family sought

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[2] While most assignment plans allow for transfers to unit siblings, regardless of race; some race-based plans are so stringent in their racial balancing that they will even keep apart brothers and sisters. *See e.g.* student assignment policy for Lowell, Massachusetts: http://www.lowell.k12.ma.us/depts/parent_info_center/index_html/?searchterm=assignment (last visited on August 14, 2006) ("Sibling Preference (brothers and/or sisters) - all students whose parents make timely application to a particular school and already have other children attending that school are given priority of assignment to that school for their racial group" (emphasis added)).

[3] Girls Incorporated is a national nonprofit youth organization dedicated to inspiring all girls to be strong, smart, and bold. With roots dating to 1864, Girls Inc has provided vital educational programs to millions of American girls, particularly those in high-risk, underserved areas. Today, innovative programs help girls confront subtle societal messages about their value and potential, and prepare them to lead successful, independent, and fulfilling lives.

[4] As a result of the *Comfort* litigation, this plaintiff and the other plaintiff children were granted temporary transfers to their schools of choice and she was able to enroll in Girls, Inc.

a transfer because, in order for their son to walk to his current school, he had to walk past streets populated by drug dealers, crack houses and a building known in the community to house prostitution. There had even been a murder on the street her son had to walk down every day to get to his school. Participating in Lynn's school choice program would allow their son to take a different path to school, but race limited the transfers available.

Another plaintiff had been physically assaulted in his current school. His mother could not use Lynn's school choice program to move her son because of his race.

Some students were denied access to schools offering special programs partnering the school with local businesses or with a local theater company. These academic programs were denied to children because of their race.

In school systems where these race-based assignment policies force children into schools located considerable distances from their homes, the ability of parents to participate in their child's education can be dramatic. The school systems in the Northeast may be smaller because they are based on municipalities rather than counties. However, the difficulty of urban travel can make assignment to distant schools, even within the same city, nearly impossible for a parent to attend parent-teacher conferences or to simply attend their child's sporting events. Inner-city children who attend public schools often come from single parent homes or both parents work making it impractical to expect any real or meaningful involvement by the parents in the school.

Choice of schools can be for reasons as simple as proximity to the parent's workplace. If the child's school is not located near either home or their workplace, parents often cannot be involved in their child's school. These race-based programs are often used by urban school systems, which include many children whose parents lack the means for traveling the considerable distance the

school buses transport their children. These children, who are often most at risk, are denied the involvement of their parents in their educations.

School choice programs must offer choices that parents find valuable in order for school choice programs to be effective. Those tangible benefits are being denied to children and their parents. When those denials have the effect of discouraging parental involvement in schools, the school system as a whole also suffers.

Race does not need to be this disruptive force in our public schools. As explained in the discussion of race neutral alternatives below, Boston's experience (albeit after several lawsuits) with school choice ***without*** racial barrier shows that choice without racial classifications can be an effective tool for maintaining racial diversity in the classroom.

B. Defining diversity by race relies on stereotypes and thereby stigmatizes children

Using race-based student assignments to achieve diversity based purely on race assumes that a child will contribute in a certain way to the classroom, without any examination of the individual child. By using the broad classifications minority and non-minority or Black and White, the level of diversity achieved by these programs is extremely limited. For example, under Seattle's Plan a recent Cambodian immigrant, who would be classified simply as a "minority," would be denied an assignment to a school that is populated predominately by native-born minority students, regardless of the individual contribution the recent immigrant could bring to disarming racial stereotypes, increasing racial tolerance, and preparing students to live and work in an increasingly multi-racial society. That same child would be classified as an Other under Jefferson's rules and would be assigned as a white.

As this Court has previously noted, "the simple act of granting benefits based on a quota or other mechanical use of race will breed cross-racial tension." *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Recently this Court again recognized the harm caused when government uses race to distinguish between individuals. "[R]acial classifications 'threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility' . . . By perpetuating the notion that race matters most, racial segregation of inmates 'may exacerbate the very patterns of [violence that it is] said to counteract.'" *Johnson* v. *California*, 543 U.S. 499, 507 (2005) (emphasis in original), *quoting*, *Shaw*, 509 U.S. at 643.

While the defenders of racial balancing argue that assigning children by skin color will reduce stereotyping, this Court has previously recognized that racial stereotypes usually underlie the mistaken belief that racial hostility can be cured through using racial classifications. *See Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns"); *Watson* v. *Memphis*, 373 U.S. 526, 536 (1963) ("neither the asserted fears of violence and tumult nor the asserted inability to preserve the peace was demonstrated at trial to be anything more than personal speculations or vague disquietudes of city officials").

Under the Jefferson County and Seattle assignment plans, race is the sole determinative factor. An assignment request that violates the racial restrictions will be denied regardless of the child's other characteristics. When a child sees a neighbor being admitted to a school to which they are denied access, there is no doubt that race is the reason. Or, as occurred with one pair of sisters of biracial parents in the *Comfort* case, when one sister (who was listed in school records as white) was permitted a transfer, but the other sister (who

was listed as black) was not; there could be no doubt in the mind of these two girls that race makes all the difference as to how they will be treated.

This use of *de jure* discrimination against school children as a means of addressing naturally occurring (*de facto*) housing patterns does as much to stigmatize children as any other discriminatory policy used by government. It teaches the lesson that race matters more than any other individual characteristic and that traits can and should be attributed to an individual based on nothing more than the color of that person's skin.

III. Individualized Consideration

A. The individualized consideration test for narrow tailoring is not uniquely applicable to higher education or viewpoint diversity.

The justification for racial diversity cannot be found in *Grutter*, which explicitly did not adopt diversity measured by race alone as a compelling interest. *Grutter*, 539 U.S. at 336 ("each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application"). While *Grutter* does not support the racial diversity interest adopted by the First, Sixth and Ninth Circuits, the basic requirements of narrow tailoring applied in *Grutter* are applicable to all racial classifications.

> [T]he hallmarks of a narrowly tailored plan [is that there be] truly individualized consideration [in which race is only] used in a flexible, nonmechanical way. [The plan cannot] insulate applicants who belong to certain racial or ethnic groups from the competition for admission.

Grutter, 539 U.S. at 334. Despite this, the First and Ninth Circuits held that these fundamental requirements of narrow tailoring are not applicable to racial diversity.

These Circuits mistakenly viewed individualized consideration as a unique feature added to the narrow tailoring analysis in *Grutter* and only applicable in like cases. This ignores this Court's previous application of the requirement in other settings unrelated to viewpoint diversity. Individualized consideration ensures the longstanding requirements that racial classifications be applied in a flexible manner and in a way that minimizes their impact on innocent third parties. *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). This requirement has been applied in cases wholly distinguishable from the discussion of viewpoint diversity in *Grutter*.

In *Croson*, this Court rejected the use of a ridged numerical quota where individualized consideration of applicants could have been used to determine which businesses has been disadvantaged by prior discrimination. 488 U.S. at 507-08. Again in *Adarand Constructors* v. *Peña*, this Court used individualized consideration as a measure of narrow tailoring when reviewing a policy that presumed that all minority owned businesses were socially and economically disadvantaged. 515 U.S. 200, 207, 238 (1995).

Requiring individualized consideration in contract set-aside cases is not intended to ensure a diversity of viewpoints among contractors. Individualized consideration is required to ensure flexible application of racial classifications and to minimize their impact on third parties – *i.e.*, it ensures that race is only used narrowly.

This requirement is based on the principle that the Equal Protection Clause "protect[s] *persons*, not *groups*." *Grutter*, 539 U.S. at 326, *quoting*, *Adarand*, 515 U.S. at 227 (emphasis in original). When a racial classification does not include individualized consideration, it can only be based on consideration of the group at the expense of the individual.

> [A]dmissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Grutter, 539 U.S. at 337.

Such group-based decision-making is necessarily based on stereotyping in that it assumes that predominantly minority schools are inherently inferior or that minority children cannot learn and develop without sufficient exposure to white children.

> After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve.

Missouri v. *Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring).

B. Racial diversity is incompatible with individualized consideration

Proponents of race-based school assignments argue that individualized examination of students is not necessary because, in their view, it is beneficial that schools evaluate their students based on nothing but their race. The First and Ninth Circuits concluded from this that individualized consideration (*e.g.*, flexible application and minimizing the impact) should not be applicable to an interest in racially balanced schools.[5] But this is the fatal

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[5] As addressed in section IV.A.2 below, the Sixth Circuit has created a new, hollow, form of the individualized consideration prong of strict scrutiny for race-based assignments in public schools.

flaw of racial diversity. Individualized consideration is incompatible with racial diversity because racial diversity is inherently incompatible with the Equal Protection Clause, which is designed to protect against government distinguishing between citizens based on nothing more than their race.

The purpose of the individualized consideration requirement is to ensure that government does not choose between individuals based on nothing more than the color of their skin. For example, in *Adarand* and *Croson*, it ensured that the benefits of a remedial contract preference (had one been properly established) would not be distributed solely on race. Individualized consideration ensures that such a remedial benefit would only be distributed to those who had been victims of discrimination within the relevant industry. *Adarand*, 515 U.S. at 207, 238; *Croson*, 488 U.S. at 507-08. In *Grutter*, the individualized consideration requirement prevented the law school from selecting applicants simply for belonging to the right race and required that they be selected based on how the applicants would contribute to viewpoint diversity. *Grutter*, 539 U.S. at 316.

When the goal is nothing more than racial balancing for its own sake, examination of the individual child loses much of its value as a tool for minimizing the impact of the racial classification. But that is only if you first accept the idea that exposing our youngest citizens to racial decisionmaking is a compelling interest; that it is permissible and even beneficial for government to view children as nothing more than members of a race and not as individuals with individual characteristics that are not dictated by skin color. But, if the objective is an educational one, then examining how a child will or will not contribute to that interest is necessary in order to avoid the trap of racial stereotypes and to narrow the impact of the racial quota.

Under a racial diversity compelling interest, individualized consideration cannot fulfill its role of ensuring flexibility and minimizing the impact of the racial classification on third parties because maintaining racial diversity requires doing exactly what narrow tailoring is meant to prevent – selecting individuals based on nothing more than the color of their skin.

IV. Analysis of the individual cases

Both assignment plans lack the main indicator of narrow tailoring: individualized consideration. The Ninth Circuits failed to apply this essential element of the Narrow Tailoring test.

The Sixth Circuit recognized the applicability of the individualized consideration standard, but then failed to apply it. At the point in the assignment process that Jefferson County rejects assignments based on the Plan's mandatory racial percentages, no individualized examination of the child is made. The decision is based simply on the racial classification listed for the child. This is precisely the type of mechanical policy prohibited by the Court in *Gratz*, *Adarand* and *Croson*.

A. *Meredith* v. *Jefferson County Board of Education*

1. Background

The litigation below addressed two separate provisions of Jefferson County's student assignment Plan, one governing "traditional" assignment zone based schools. The other governs assignments to certain "non-traditional" schools that use innovative curricula and are not restricted based on geographic assignment zones. Both portions of the assignment plans had the same objective of maintaining a predetermined level of racial balancing (*i.e.* racial diversity).

The portion of the assignment plan that governed traditional schools was found unconstitutional by the U.S.

District Court for the District of Western Kentucky. The portion of the assignment plan that controlled "non-traditional" magnet schools was sustained as being narrowly tailored to achieve an interest in maintaining racial diversity. The Petitioners appealed to the Court of Appeals for the Sixth Circuit. The school system did not cross appeal as to the portion of the plan governing traditional schools. In a brief *per curium* decision, the Sixth Circuit sustained the decision of the District Court as to both elements of the plan. Only the portion of the plan governing assignments for "non-traditional" magnet schools is at issue before this Court.

The Jefferson Plan divides students into two racial classifications for assignment purposes, Black and White (minority children of races other than African-American are designated as "Others" and are assigned under the White assignment rules). *McFarland* v. *Jefferson County*, 330 F.Supp.2d 834, 840 n.6 (W.D.Ky 2004). The Plan is designed to adjust the racial composition of all schools so that their "Black" student populations fall within 15% to 50%. *Id.* at 842. The non-traditional schools use a number of criteria to determine admission, but all other criteria are subordinate to the race of the child. *Id.* at 845.

In seeking its diversity goal, the Jefferson Plan uses terms for "racial diversity" that are as imprecise as the Plan itself. The treatment of "Others" (minorities other than African-Americans) as White for assignment purposes bears no rational connection with the stated goal of maintaining a racial diverse classroom. This imprecision of the Jefferson Plan puts it in conflict with this Court's previous recognized that the use of broad, ill-defined classifications evidences a lack of sufficient narrow tailoring. *Wygant* v. *Jackson Bd. of Education*, 476 U.S. 267, 284 n. 13 (1986) ("defin[ing] minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan").

2. The Sixth Circuit failed to correctly apply the individualized consideration prong of the narrow tailoring test

While the Sixth acknowledged that individualized consideration is constitutionally required, that Court also had to confront the inherent incompatibility of racial diversity with this requirement. The Sixth Circuit's solution was to apply a hollow version of the analysis. None of the factors listed by Sixth Circuit consider an individual child's effect on the classroom environment or act to minimize the impact of the racial quota.

While the Court below found that, in addition to race, "[m]any factors determine student assignment, including address, student choice, lottery placement" (*McFarland*, 330 F.Supp.2d at 859), even a cursory review of these other factors reveals that they are unrelated to any examination of the characteristics of the individual child. If a parent chooses a school for their child, and that child is of the wrong race for that school, no other characteristic possessed by the child will override the color of their skin. None of these factors are considered along with race in determining if an assignment will be granted. Race is a stand-alone determinative factor. The most important thing about these "individualized factors" is that they in no way examine how a child will, or will not, contribute to any purported educational objective of the Plan.

Put simply, the Jefferson Plan relies on stereotypes. It assumes based on the broad and ill-defined classifications of White and Black that a child will contribute in a certain way, without any examination of the individual child.

3. It is irrelevant that the Jefferson Plan mandates a range rather than a single racial percentage

The Court below incorrectly held that Jefferson County's student assignment plan does not constitute a

quota where the mandated racial percentages are defined by a range rather than a single number. *McFarland*, 330 F.Supp.2d at 857. "[A] 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (emphasis added). *See also, Id.* at 335 (quotas "insulate the individual from comparison with all other candidates for the available seats"); *Gratz*, 539 U.S. at 251 (to the extent that viewpoint diversity can be considered a compelling interest, the use of a quota is not a narrowly tailored way of achieving that interest).

The strained effort to parse the language it uses to describe the Plan's mandated racial percentages does not immunize the Jefferson Plan from the general prohibition against race-based assignments. At a certain point in its application process the Plan relies on race and ethnicity, and nothing else, to select a subset of entrants. *McFarland*, 330 F.Supp.2d at 859.

The Jefferson Plan determines whether an assignment will or will not be made based on the race of the child. Assignments are denied where the child's race would put the school outside of a desired racial percentage. *Id.* at 859. The rigors of strict scrutiny cannot be avoided simply by setting a racial range rather than a single racial percentage.

4. The Jefferson Plan is a non-remedial quota

The Jefferson Plan is not remedial. Any lingering effects of the previous dual school system operated by Jefferson County have been eliminated. *Hampton* v. *Jefferson County Board of Education*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) ("To the greatest extent practicable, the Decree has eliminated the vestiges associated with the former policy of segregation and its pernicious effects").

The "segregation" Jefferson County seeks to address through its *de jure* discrimination in student assignments is not the result of any action by its school system. The limited *de facto* "segregation" that would occur in Jefferson County's student population without the Plan's racial barrier would be the result of housing patterns not some constitutional violation of the school system. *McFarland*, 330 F.Supp.2d at n. 5.

5. Plus factor versus mechanical application

In *Gratz* the Court made clear that a policy that automatically benefits an "applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity." *Gratz*, 539 U.S. at 270. The District Court considered the Jefferson Plan as using race as only one of several characteristics. This misstates the actual operation of the racial restrictions. Race does not act as a "plus fac or" as in the *Grutter* policy. Race is not even used as a mechanically-applied plus factor of the type rejected in *Gratz*. In the Jefferson Plan, race completely overrides all other factors. A child who belongs to the "wrong" race cannot overcome his pedigree by receiving "points" for other characteristics as in the unconstitutional *Gratz* Plan. This makes the Jefferson Plan more harmful than the admissions plan rejected in *Gratz*. A student rejected by the University of Michigan would not know if race was the reason for their rejection. Under Jefferson's Plan, a rejected child knows they are being excluded for being the wrong color.

The Jefferson Plan explicitly hinges the availability of a transfer on a student's race. There is no individualized consideration of a student's qualifications, no head-to-head comparison of one student to another, and no weight given to a student's other potential contributions to education within the particular classroom.

B. *Parents Involved in Community Schools* v. *Seattle School District No. 1*

1. The Ninth Circuit eliminated the critical individualized consideration prong from its narrow tailoring analysis

In apparent recognition of the inherent incompatibility of racial diversity with the Equal Protection Clause's requirement of individualized consideration, the Ninth Circuit eliminated Strict Scrutiny's protections of innocent third parties and requirement that the impact of the racial classification be minimized. The elimination of these constitutional protections was necessary in order to sustain racial diversity as a compelling interest because that interest cannot coexist with the concept of the Equal Protection Clause as an individual right, rather than a group right.

2. The +/-15% range is tailored to naked racial balancing and no other interests

The Ninth Circuit held:

> [W]e conclude that the District's 15 percent plus or minus variance is not a quota because it does not reserve a fixed number of slots for students based on their race, but instead it seeks to enroll a critical mass of white and nonwhite students in its oversubscribed schools in order to realize its compelling interests.

PICS, 426 F.3d at 1184. The holding flies in the face of logic. First, the +/-15% is a quota. It insulates children from comparison with children who belong to the disfavored race for a particular school. *Grutter*, 539 U.S. at 334 (quotas "insulat[e] . . . applicants with certain desired qualifications from competition with all other applicants"). If, in Seattle's view, there are not enough minority children in a particular school, assignments to that school will be limited by race until the desired minimum percentage of minorities is meet. The quota

may change from year to year, but for each school there is a desired racial percentage. If a child's assignment would be contrary to that racial percentage, it was rejected so as to maintain a minimum of the favored race for that school. This is a quota.

Second, plans that ensure proportional representation within +/-15% of the system wide minority population are not designed to maintain a critical mass. Seattle's +/-15% range is not tied to maintaining some minimum level of minority and non-minority children in each classroom, it is an arbitrary range that changes as the racial composition of the City changes.

Under its plan, Seattle did not reject assignment request based on a negative impact on "critical mass." It rejected requests based on impact on proportional representation. As noted by the Ninth Circuit, one Seattle school would have been 41.1% minority without the race restrictions. *PICS*, 426 F.3d at 1171. Despite this considerable number minority students in that school, the Plan +/-15% racial restriction rejected assignment requests in order to move the school closer proportional representation of the system wide average, making the school 55.3% minority. *Id.* Those children rejected from the Roosevelt School were not rejected in order to maintain a "critical mass," they were rejected to create proportional representation. *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972) ("Statutes affecting constitutional rights must be drawn with 'precision.' and must be 'tailored' to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means").

If the goal was maintaining some ill-defined critical mass, the Seattle Plan strikes far to broadly. By denying assignments based on impact on proportional representation, children are rejected whose assignments

would not impact "critical mass" and would only impact the goal of move all schools closer to the system wide racial makeup. This sledgehammer approach to "ensuring a critical mass in oversubscribed schools" fails to minimize impact on innocent parties.

> Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still "constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose."

Grutter, 539 U.S. at 334 (emphasis added), *quoting*, *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). The +/-15% range used by Seattle has only one use: maintaining racial balance. Such a plan is not narrowly draw to achieve any other purpose.

3. The experience of Seattle and other cities that have stopped their race-based assignments demonstrates the ineffectiveness of these programs

Seattle has had the same experience as other cities that have abandoned race-based student assignments. Seattle suspended use of the plan at issue in the *PICS* case following the 2001-02 school year. *PICS*, 426 F.3d at 1195 ("the plan was put on hold, and at least one class has entered and will have completed its entire high school career without ever being affected by it"). Despite the lack of race-based assignments, Seattle's schools apparently have not descended into racial anarchy. *See* Seattle Public Schools Data Profile: District Summary, SISO – DECEMBER 2005, http://www.seattleschools.org/area/siso/disprof/2005/DP05testach.pdf ("All grade levels scored above the national average of 50 in all subtests in 2005. High school test scores rose in all three subtests, by

2 points in Reading and 1 point in both Language and Mathematics" (last visited on August 14, 2006)).

Seattle's lack of a negative educational consequence mirrors the experience of other communities like Boston, which abandoned its use of race-based school assignment in the face of litigation. Following the elimination of race as a factor in assignments, Boston experienced only a negligible drop in the level of racial diversity in its schools. *Anderson* v. *City of Boston*, 375 F.3d 71, 85 (1st Cir. 2004) (noting the testimony of the Boston Public Schools' Superintendent that "the New Plan maintained approximately the same racial balance within the schools as the Old [race-based] Plan"). Schools in Boston and Seattle remain racially diverse and as educationally effective (or ineffective) without their former racial restrictions.

If there has been no demonstrable educational impact from the elimination of race-based assignments in school systems like Boston and Seattle, then the effect of race-based plans cannot be said to have a demonstrable educational benefit. The most that can be said is that the elimination of these plans has an impact on racial balancing. But this Court has long held that racial balancing cannot be an objective for its own sake. *Grutter*, 539 U.S. at 330 ("outright racial balancing [ ] is patently unconstitutional"); *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake"); *Swann*, 402 U.S. at 24 (an order requiring "any particular degree of racial balance or mixing . . . would be disapproved and we would be obliged to reverse").

V. Availability of race neutral alternatives

"Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Grutter*, 539 U.S. at 339. The respondents in both matters failed to prove that the race-neutral alternatives like those

examined by the Department of Education or endorsed by the First Circuit would not achieve their proffered interest of maintaining racial diversity/racial balance.

The United States Department of Education has conducted an in-depth study of whether diversity in education can be effectively maintained through race-neutral means. The Department of Education published its findings in ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION, U.S. Dept. of Ed., February, 2004, http://www.ed.gov/about/offices/list/ocr/raceneutral.html. The Department of Education study reviewed several race-neutral programs proven to be successful at achieving and maintaining diversity in the public elementary and secondary schools. *See Id.* at 66-71 (noting in particular the effectiveness of socio-economic based assignment processes); *Id.* at 78-79 (reviewing examples of successful race-neutral lottery programs in maintaining diversity in public elementary and secondary schools).

Another race-neutral alternative for maintaining diversity in public schools was examined by the First Circuit in *Anderson* v. *City of Boston*, 375 F.3d 71 (1st Cir. 2004). Boston's policy of assigning half of the seats at each school to neighborhood children and the other half through school choice, without racial restrictions, drawn from assignment zones each representing 1/3 of the City has proven to be as effective at maintaining racial diversity as its earlier quota-based assignment policy had been. *Anderson*, 375 F.3d at 85.

Boston's earlier race-based plan shared several characteristics of the plan used by Seattle and Jefferson County. Boston's earlier quota-based student assignment plan used parental choice, geographic preferences and sibling preferences to assign students. Applicants to each school were ranked based on randomly assigned numbers, but assignments would be rejected if they would cause a

school to deviate from the desired 30% range for racial make-up of each school. *Anderson*, 375 F.3d at 75.

Boston abandoned its old plan when the city was sued. Boston then adopted its new choice plan, which lacked the racial restrictions of the old plan. After reviewing this new race-neutral plan, the First Circuit found that its has been equally as effective at maintaining racial diversity as the old, race-based, plan. *Anderson*, 375 F.3d at 85.

VI. This Court has limited racial balancing to the remedial context

Courts exercising their remedial power to make whole an injured party may impose remedies that would be unconstitutional if adopted voluntarily in a non-remedial setting. *See e.g., National Soc'y of Professional Eng'r, Inc.* v. *United States*, 435 U.S. 679 (1978) (court may impose remedy that would otherwise violate First Amendment freedom of speech if imposed under other circumstances). Given this broad remedial power, this Court has permitted the limited use of racial balancing as a remedial tool. But even when utilized in this remedial context, the Court has shown disfavor for racial balancing. In *Pasadena Bd. of Educ.* v. *Spangler*, this Court held that it would be beyond the remedial authority of the district court to require the annual readjustment of school attendance zones to counteract changes in the racial makeup of the schools. 427 U.S. 424, 433-34 (1976) ("'it must be recognized that there are limits' beyond which a court may not go in seeking to dismantle a dual school system"). Again, in *Freeman* v. *Pitts*, this Court held that courts are prohibited by the Equal Protection Clause from adopting limitless racial balancing.

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no

> duty to remedy imbalance that is caused by demographic factors.

503 U.S. 467, 494 (1992). Earlier, in *Swann*, this Court held that a remedial order that required "any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Swann*, 402 U.S. at 24.

Under this Court prior decisions, racial balancing is only permissible for the limited purpose of remedying lingering effects of discrimination. Once those lingering effects have been cured, the racial balancing must stop. The First, Sixth and Ninth Circuits permit this use of perpetual racial balancing for a non-remedial purpose.

VII. No deference is owed when government chooses to utilize racial classifications

The educational context of this litigation does not diminish the heavy burden of justifying applicable to the use of a racial classification. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973) ("the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation").

Even in the context of the deference given by this Court to the University of Michigan Law School, the Court made clear that it would not have accepted just any interest offered by the University as being educationally required. Had the University of Michigan made the educational judgment that racial balancing justified the use of race in admissions decisions, the Court would have rejected that educational judgment. *Grutter*, 539 U.S. at 308 ("Enrolling a 'critical mass' of minority students simply to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional"); *Gratz*, 539 U.S. at 270 ("In *Bakke*, Justice Powell reiterated that '[p]referring

members of any one group for no reason other than race or ethnic origin is discrimination for its own sake'").

More recently, the Court refused to pay deference to the experience and expertise of prison administrators because, "such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson*, 543 U.S. at 499, n.1. *See also*, *Adarand*, 515 U.S. at 224 ("Any person of whatever race has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny").

CONCLUSION

Reduced to its essence, the issue before this Court is whether the Equal Protection Clause of the Fourteenth Amendment protects individuals or groups. In holding that racial diversity in public schools is a compelling governmental interest, the First, Sixth and Ninth Circuits have removed the Equal Protection Clause's requirement that government view its citizens as individuals rather than members of a race. These Courts have established a new standard for racial classifications, which is based on a zero-sum-game analysis. So long as each race is equally benefited and burdened by the racial discrimination, there is no constitutional injury to the individuals who suffer from that discrimination.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Powers v. *Ohio*, 499 U.S. 400, 410 (1991), *citing*, *Loving* v. *Virginia*, 388 U.S. 1 (1967).

The decisions at bar remove the requirements of flexible application and minimization of the impact of the racial classification and permits a return to widespread assignment of children to schools based on skin color.

For each of these reasons and the reasons state in Petitioners Briefs, the *amici* school children from Lynn, Massachusetts pray that the decisions of the Sixth and Ninth Circuits be reversed in the hopes of ending the racial barrier to which they are subject.

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